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THE ROLE OF LITIGATION IN GAY RIGHTS: THE MARRIAGE EXPERIENCE

WILLIAM C. DUNCAN*

I. INTRODUCTION

However one might feel about the substantive question of whether marriage ought to be redefined to include same-sex couples, all will probably agree that the question of how this issue came to the forefront of legal debate is fraught with interest. From the early cases filed in the 1970s and 1980s¹ to the groundbreaking Hawaii Supreme Court decision in 1993 which branded marriage a form of sex discrimination,² progress on redefining marriage seemed unlikely. In the decade after the Hawaii decision there were a handful of court decisions finding in favor of the advocates of redefining marriage. None of these decisions, however, led to the issuance of marriage licenses to same-sex couples.³ That changed in November 2003 when the Massachusetts Supreme Judicial Court changed the Commonwealth's longstanding definition of marriage to "the voluntary union of two persons as spouses, to the exclusion of all others."⁴ Since then, two trial courts have ruled in favor of claims to redefine marriage⁵ and lawsuits are pending in five additional states.⁶ Additionally, a series of high-profile publicity campaigns by local officials issuing marriage licenses to same-sex couples has brought the issue to the

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1. *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982), *cert. denied* 458 U.S. 1111 (1982); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974).

2. *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993).

3. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

4. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

5. *People v. West*, 780 N.Y.S.2d 723, 725 (Just. Ct. 2004); *Li v. State*, No. 0404-03057, 2004 WL 1258167, at *10 (Or. Cir. Ct. Apr. 20, 2004).

6. Cases are pending in California, Indiana, New Jersey, New York, and Washington. See David Crary, *U.S. Taking Big Step on Gay Marriage*, DESERET NEWS (Salt Lake City), May 16, 2004, at A1; Tim Evans, *Same-Sex Marriage Debated Here*, INDIANAPOLIS STAR, Jan. 13, 2004, at A1.

forefront of national debate.⁷ Currently a proposed constitutional amendment to define marriage is pending in the United States Congress.⁸

To summarize, the definition of marriage as it relates to same-sex couples emerged for the first time three decades ago.⁹ For two of those decades sporadic cases resulted in no progress toward getting the claim accepted.¹⁰ When the first initial success was experienced, momentum began to build, but did not yield the end ultimately sought for another decade.¹¹ However, when that ultimate victory was attained, it took only months to see major progress for the effort in other states.¹²

The obvious question raised by this remarkable series of events is—how did it happen? A few articles have been written which try to provide modest narratives for some of the events, but there is much we do not know and may not for years to come.¹³ There is, however, one major fact that is glaringly obvious to any observer—this has been a courtroom battle.

This article will take the recent Massachusetts decision and the surrounding controversy it engendered as an example of the litigation-centered nature of the marriage debate. The next section will provide a brief narrative of the redefinition of marriage in Massachusetts. This will be followed by a critique of the judicially-driven nature of the effort to redefine marriage.

II. SAME-SEX MARRIAGE IN MASSACHUSETTS

Before November 17, 2003, only the Netherlands, Belgium, and some Canadian provinces had issued marriage licenses to same-sex couples under a regime where marriage had been redefined.¹⁴ How did Massachusetts come to this point?

The short answer is that it did so pursuant to a court order. The order was issued in November 2003 when the Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*, ruled that the current definition of

7. *West*, 780 N.Y.S.2d 723; Cheryl Wetzstein, *Licenses to Gays Top 2,000*, WASH. TIMES, Feb. 17, 2004, at A1; William McCall, *Multnomah Gay Marriage Halted*, THE COLUMBIAN, Apr. 21, 2004, at A1; Chris Frates, *Gay Marriage Foes Protest Rulings By 'Legal Barbarians'*, DENVER POST, Feb. 22, 2004, at B1; Tom Feeney, *Gay Marriage Licenses Halted*, STAR-LEDGER (Newark, N.J.), Mar. 11, 2004, at 21.

8. H.J. Res. 56, 108th Cong. (2003); S.J. Res. 108th Cong. (2003).

9. *Baker*, 191 N.W.2d 185.

10. *Adams*, 673 F.2d at 1040; *Jones*, 501 S.W.2d at 589; *Baker*, 191 N.W.2d 185; *DeSanto*, 476 A.2d 952; *Singer*, 522 P.2d at 1189.

11. *Baehr*, 852 P.2d at 59; *Goodridge*, 798 N.E.2d at 968.

12. *See West*, 780 N.Y.S.2d at 725; *Li*, 2004 WL 1258167, at *10.

13. *See Wetzstein*, *supra* note 7; *McCall*, *supra* note 7; *Frates*, *supra* note 7; *Feeney*, *supra* note 7.

14. Colin Nickerson, *Ontario Court OK's Same-Sex Marriage*, BOSTON GLOBE, June 11, 2003, at A1.

marriage in the Commonwealth failed to satisfy rational basis under the state constitution.¹⁵

The litigation culminating in this decision dates back to strategy meetings held in the early 1990s when activists discussed the possibility of litigation to obtain marriage licenses for same-sex couples.¹⁶ However, the genesis of the Massachusetts case can probably be traced to 1999 when the Vermont Supreme Court ruled that while the definition of marriage might not need to be changed, the benefits of marriage must be extended to same-sex couples in order to satisfy state constitutional guarantees.¹⁷ The Vermont Legislature responded by creating a new status of civil unions.¹⁸ While this result was certainly a milestone, it was not, strictly speaking, what the plaintiffs had sought—marriage licenses.

After another planning meeting in 2000, Gay and Lesbian Advocates and Defenders (“GLAD”), co-counsel in the Vermont litigation, filed suit in a Suffolk County, Massachusetts court on behalf of seven same-sex couples.¹⁹ Both the timing and the nature of the lawsuit were strategic.²⁰ The plaintiffs were carefully selected after an interview process to ensure they would provide a sympathetic face for the legal claims.²¹ The jurisdiction was chosen because the legal culture evidenced a predisposition to accept the plaintiffs’ novel legal claims.²² The case also scrupulously avoided federal claims to ensure that federal officials could not affect the outcome.²³

As is now well-known, this careful planning paid off. A 4-3 majority of the Massachusetts Supreme Judicial Court enthusiastically embraced plaintiffs’

15. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

16. See David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES MAG., May 9, 2004, at 52.

17. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

18. VT. STAT. ANN. tit. 15, § 1201 (2002).

19. Yvonne Abraham, *10 Years’ Work Led to Historic Win in Court*, BOSTON GLOBE, Nov. 23, 2003, at A1.

20. A recent news report indicates that a same-sex couple sought legal help in securing a redefinition of marriage in Massachusetts as early as 1990, but GLAD decided that since the lawsuit was perceived to have “no chance of success” it was the wrong time to bring such a claim. Garrow, *supra* note 16, at 52.

21. Abraham, *supra* note 19. (“The plaintiffs, who would serve as the public face of the lawsuit were chosen carefully. They had to be varied in age, ethnicity, and profession. They had to be well-spoken, but not too political. They had to be longtime couples who had been faithful to one another. They had to stand up to rigorous criminal background checks and to convince the lawyers that there were no skeletons in their closets.”); See also Elizabeth Mehren, *Marriage Is Paramount, Gays Agree*, L.A. TIMES, Mar. 7, 2004, at A18. (GLAD “interviewed more than 100 same-sex couples from across Massachusetts in order to find a mix of potential plaintiffs.”).

22. See Carolyn Lochhead, *Lawyer’s Gay Rights Strategy-Patience While Public Adjusts*, S.F. CHRONICLE, May 24, 2004, at A1; see also Abraham, *supra* note 19.

23. See *Goodridge*, 798 N.E.2d at 948.

legal claims in November 2003.²⁴ The majority concluded that Massachusetts' marriage law was "rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."²⁵ Thus, the court took it upon itself to create a new definition of marriage: "the voluntary union of two persons as spouses, to the exclusion of all others."²⁶

What is less well known is the role of the legislature in the saga of same-sex marriage in Massachusetts. In 2001, a citizen coalition gathered 76,607 certified signatures (57,100 were needed) to place before the Massachusetts legislature a proposed constitutional amendment that, if passed, would have defined marriage as the union of a man and a woman and prevented the creation of a marriage equivalent.²⁷ In order to be placed on the ballot, the measure needed to gain the support of 25% of legislators in two successive sessions.²⁸ Evidencing a fear of the popular vote that bordered on "democraphobia," the *Goodridge* lawyers lobbied the Attorney General and filed suit to prevent the legislature from considering the proposed amendment.²⁹

The courtroom effort was not necessary. The Senate President ensured that the bill would not get a vote by simply ending the constitutional convention before such a vote could be taken.³⁰ The Supreme Judicial Court ("SJC") ruled that this violated the Massachusetts Constitution, which calls for "final action" on initiative proposals, but nothing was done.³¹ If the legislature had voted at that time, the measure could have been on the November 2004 ballot.³²

In 2003, a new proposed amendment was introduced, but was not acted on until after the *Goodridge* decision.³³ In response to the decision, the Senate President asked the SJC if it would approve of a civil union law that, like Vermont's, provided all of the benefits of marriage to same-sex couples under a different name.³⁴ The court brusquely rejected the proposal, holding that it

24. *Id.* at 941.

25. *Id.* at 968.

26. *Id.* at 969.

27. See Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137, 178 n.215 (2002).

28. *Id.* at 178 n.214.

29. *Albano v. Att'y Gen.*, 769 N.E.2d 1242, 1244 (Mass. 2002); Herdlein, *supra* note 27, at 179.

30. Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232, 1234 (Mass. 2002); Abraham, *supra* note 19.

31. MASS. CONST. art. XLVIII, § 158; *Opinion of the Justices to the Acting Governor*, 780 N.E.2d at 1235.

32. *Opinion of the Justices to the Acting Governor*, 780 N.E.2d at 1234.

33. William C. Duncan, *Revisiting State Marriage Recognition Provisions*, 38 CREIGHTON L. REV. (forthcoming December 2004).

34. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

would only be satisfied by the issuance of marriage licenses.³⁵ Thus, the legislature returned to the proposed amendment but refused to squarely address the SJC's decision, opting instead to propose an amendment that, while defining marriage as the union of a man and a woman, also simultaneously created a civil union status.³⁶ The citizen-initiated amendment was never to reappear.

The Governor, on the other hand, made some efforts to respond to the court decision. When the legislature had approved its proposed amendment, he asked the Attorney General to petition the court to stay its decision until the amendment could be submitted to the popular vote.³⁷ The Attorney General refused, and the legislature would not act on the Governor's subsequent request for the appointment of a special counsel to pursue the option.³⁸

Same-sex marriage in Massachusetts was conceived in legal strategy meetings, midwived by a timid legislature, and finally born in the Massachusetts Supreme Judicial Court.

III. JUDICIAL RULE: A CRITIQUE

A determination that the redefinition of marriage has been, to this point, solely a judicial accomplishment does not lead necessarily to a normative conclusion. Certainly one might argue that the definition of marriage is an appropriate subject for judicial oversight. This proposition can be tested by asking (1) whether the judiciary has legal authority to redefine marriage, (2) whether the legal profession may have particular insights that fit it for deciding the question, and (3) what the results of litigation-created marriage policy might be for broader society.

A. *Separation of Powers*

Some judges have recognized the separation of powers problem inherent in judicially mandated marriage policy. Perhaps most succinct is this statement from a concurring opinion in a same-sex marriage decision from the District of Columbia:

It seems obvious that the remedy for the dilemma facing these appellants lies exclusively with the legislature . . . no court can order a legislature to enact a particular statute so as to achieve a result that the court might consider

35. *Id.*

36. The amendment must be approved again in the next legislative session before it is subject to a vote in the general election. Jennifer Peter, *State Moves Toward Gay Marriage Ban*, CHARLOTTE OBSERVER, Mar. 30, 2004, at 6A.

37. Raphael Lewis, *Romney Seeks Authority to Delay Same-Sex Marriage*, BOSTON GLOBE, Apr. 16, 2004, at A1.

38. *Id.*

desirable, or to appropriate money for a purpose that the court might deem worthy of being funded. The separation of powers doctrine prohibits such action by a court.³⁹

In noting its duty to defer to the legislature on matters such as the definition of marriage, the trial court opinion in the Massachusetts case linked this deference with “separation of powers principles, which are even stronger when a court is asked to invalidate, rather than simply interpret, a legislative enactment.”⁴⁰ One irony of the SJC’s reversal of the lower court is that the Massachusetts Constitution, on which the SJC purported to rely, contains a very strong formulation of the principle of separation of powers:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.*⁴¹

Criticisms of judicial actions that are seen as encroaching on legislative or executive authority are, of course, legion and have been raised throughout the history of the republic.⁴² It is not likely that anyone would argue that if a court were to directly enact statutes, it would be violating the principle of separation of powers.⁴³ In the same-sex marriage cases, the courts have tried to avoid this charge by characterizing their actions as straightforward applications of clear constitutional principles to challenged law.⁴⁴ The Vermont Supreme Court’s marriage decision asserts that “it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing.”⁴⁵ Similarly, the Massachusetts SJC invokes “the traditional and settled role of courts to decide constitutional issues” and, not surprisingly, includes the definition of marriage as part of this class of issues.⁴⁶

These assertions notwithstanding, what the courts do in both cases looks very much like usurping the legislative function. The remedy provided by the Vermont court, for instance, ordered the legislature to create legislation to

39. *Dean v. Dist. of Columbia*, 653 A.2d 307, 362 (D.C. Cir. 1995) (Terry, J., concurring).

40. *Goodridge v. Dept. of Pub. Health*, No. 20011647A, 2002 WL 1299135, at *5 (Mass. Super. Ct. May 7, 2002).

41. MASS. CONST. art. XXX, § 31 (emphasis added).

42. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 63-64 (1989-1990).

43. See MASS. CONST. art. XXX, § 31.

44. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

45. *Baker*, 744 A.2d at 870.

46. *Goodridge*, 798 N.E.2d at 966.

provide the benefits of marriage to same-sex couples.⁴⁷ Lest a legislator mistake the mandate, the court specified: “In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought.”⁴⁸ In an effort to avoid the Vermont result (an alternative marital status), the Massachusetts SJC was more direct. It promulgated a new legal definition of marriage: “We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”⁴⁹ As a result of some less than artful phrasing in the opinion,⁵⁰ the Massachusetts Legislature speculated that it might be able to satisfy the court by offering a Vermont-style alternative to marriage.⁵¹ In rejecting the proposal,⁵² the court further elucidated the legislative nature of its remedy: “The purpose of the stay was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the *Goodridge* decision.”⁵³

Judicial review has generally involved a court decision that challenged legislation as unconstitutional and therefore unenforceable.⁵⁴ This allows the legislature to amend a law to address the constitutional infirmity or enact new legislation which avoids the problem. Of course, in doing so, the court could conceivably infringe on the legislature’s authority (such as by holding a law unconstitutional without any legal basis for doing so). In these cases the problem is more clear; yet, however characterized, decisions which require legislatures to write new statutes cannot escape the charge of being legislative in nature.

B. Professional Supremacy

Even without specific authority to decide controversial questions such as the definition of marriage, are courts and lawyers better equipped than legislatures to address these matters? The answer to that question may vary based on one’s view of appropriate outcomes, since, for better or worse, the legal process seems to make certain substantive outcomes more likely.

In his dissent in *Lawrence v. Texas*, Justice Scalia suggested an explanation for this: “Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called

47. *Baker*, 744 A.2d at 886.

48. *Id.*

49. *Goodridge*, 798 N.E.2d at 969.

50. *Id.* at 965 n.29 (“We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons.”).

51. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 568-69 (Mass. 2004).

52. *Id.* at 572.

53. *Id.* at 568.

54. See, e.g., *Goodridge*, 798 N.E.2d at 948; *Baker*, 744 A.2d at 867.

homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”⁵⁵ After that decision, a news report quoted Mark Tushnet, president of the Association of American Law Schools, as saying that “clearly, the legal profession and the law professoriate is strongly in favor” of “nondiscrimination against gays.”⁵⁶ Indeed, both the American Bar Association and the American Academy of Matrimonial Lawyers have specifically announced their opposition to the proposed federal marriage amendment.⁵⁷ It is understandable that the American public may view such opposition as lawyers protecting “their” turf.⁵⁸ Regardless of whether or not the legal profession is best equipped to resolve societal disputes, there is certainly evidence that it is likely to resolve such matters in certain ways.⁵⁹ This, of course, opens the profession to charges like Justice Scalia’s that the profession is “an ‘elite’ of presumptuous specialists.”⁶⁰

In the wake of public criticism of recent opinions favoring “gay rights” positions, Lambda Legal Defense and Education Fund came to the defense of judges accused of being “activists.”⁶¹ Specifically, they launched an ad campaign based around the message that “[t]here are some pretty conservative judges behind the recent gay rights court victories.”⁶² The evidence? “Four of the six justices who voted to strike down the [Texas sodomy] law were appointed by Republicans” and “[s]ix of the seven judges [on the Massachusetts SJC] were appointed by Republicans.”⁶³ In a related document, Lambda singled out one Massachusetts justice who was appointed by a Republican governor and who the Boston Globe is said to have described as “one of the court’s more conservative voices.”⁶⁴ Leaving aside the question of whether the Globe would be considered an accurate judge of conservatism, Lambda’s defense seems wholly unresponsive to the criticism. The fact that

55. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

56. Tony Mauro, *Scalia Jab at ‘Law Profession Culture’ Debated*, LEGAL TIMES, July 7, 2003, at 9.

57. See Michael Collins, *Experts Oppose Amendment*, CINCINNATI POST, Mar. 24, 2004, at A9; *Gay Marriage A-OK with Divorce Lawyers*, ADVOC. REP. 30 (June 22, 2004).

58. See Leigh Jones, *Gay Divorce as New Practice Area*, NAT’L L.J., June 28, 2004, at 1.

59. Mauro, *supra* note 56.

60. See RUSSELL KIRK, *THE WISE MEN KNOW WHAT WICKED THINGS ARE WRITTEN ON THE SKY* 87 (1987); Mauro, *supra* note 56.

61. LAMDA LEGAL, *The Real Story Behind the Right-Wing “Activist Judge” Smear Campaign*, Mar. 2, 2004, at <http://www.lamdalegal.org/cgi-bin/iowa/documents/record?record=1451> [hereinafter *Real Story*].

62. LAMDA LEGAL, *Judging Discrimination*, Mar. 3, 2004, at <http://www.lamdalegal.org/cgi-bin/iowa/documents/record?record=1450>.

63. *Id.*

64. *Real Story*, *supra* note 61.

judges are appointed by members of one political party hardly indicates that they are immune to considerations prevalent in their professional culture.

What characteristics of the segments of the legal profession that support these social changes might contribute to their specific positions on substantive legal issues? Professor Carl Schneider hypothesized that “the trend toward diminished moral discourse [in family law] is most actively promoted by lawyers, judges, and legal scholars who are, relative to the state legislators and judges who would otherwise decide family law questions, affluent, educated, and elite. This group’s views on family law questions are (relatively) liberal, secular, modern, and noninterventionist.”⁶⁵ Similarly, Professor Walter Berns noted that elements of the modern judiciary have become what the U.S. Supreme Court aspired to be in *Dred Scott v. Sanford*,⁶⁶ namely, “the initiator of social change.”⁶⁷ Professor Robert Nagel has identified some specific “lawyers’ intellectual inclinations” that might shape their response to these issues: (1) “lawyers are not at home with plain or obvious meaning” as opposed to “subtle or surprising interpretation[s]”; (2) “because so many disputes that are resolved through adjudication involve individuals, we tend to conceive of constitutional issues in terms of rights that belong to individuals, rather than in terms of more abstract matters like public understanding or organizational structure”; and (3) “we have an understandable, sometimes touching, inclination to favor judicial processes and judicial power over less familiar alternatives.”⁶⁸ He offers as example the fact that “[t]he legal mind . . . has made it somehow credible, even compelling, to find in the Constitution a whole set of rights involving a kind of behavior—sexual behavior—that without doubt is no part of the subject matter of the Constitution’s content or design.”⁶⁹

What does this mean for issues like the definition of marriage, the resolution of which some suggest should be left to the legal profession? It is not absolutely clear, because the redefinition of marriage may be the most significant social change confined to lawsuits. Even the consequential creation and spread of “no-fault” divorce, while certainly involving input from the legal profession, was legislatively enacted.⁷⁰ There are some suggestive indications of what the role of lawyers might mean for social issues.

65. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1821 (1985).

66. 60 U.S. 393 (1856).

67. WALTER BERNs, TAKING THE CONSTITUTION SERIOUSLY 218-19 (1987).

68. Robert F. Nagel, *A Comment on the Rule of Law Model of Separation of Powers*, 30 WM. & MARY L. REV. 355, 355-56 (1989).

69. *Id.* at 356.

70. See J. Herbie DiFonzo, *No Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994).

For instance, while politics is the art of the possible, requiring its participants to gain consensus and make compromises, court decisions are generally not subject to the same constraints. At the appellate level, a set of judges will have to come to consensus on a decision, an effort that will usually be confined to agreement between a small number of members of the same class with similar backgrounds, training and interests. Thus, courts may be open to the temptation to pursue a kind of perfectionism. For instance, courts and legal professionals may be tempted to gloss over complexities inherent in social institutions which have developed organically over time in favor of abstract concepts such as equality or individual rights. The court can remove significant elements of the institution of marriage (for instance, its links to procreation and sex difference) when they fail to fit into the Procrustean bed of legal analysis. Additionally, as noted by Professor Robert Nagel:

Law reform litigation promotes suspiciousness in another way as well. Something about the urgency and intense moralism of constitutional argumentation in the adversary system produces a heedlessness bordering on lawlessness. Litigation unleashes the same kinds of unrestrained energy and commitment as warfare. This is precisely why sophisticated gay rights activists can urge “ongoing guerilla warfare against bigoted precedents, laws, and policies.”⁷¹

A more obvious potential consequence is the exclusion of outside pressures, i.e., those not represented by lawyers, that might be brought to bear in the determination of important social issues. In other words, the issue would be left to the “experts.” A review of test cases involving children noted that “case studies also suggest that litigation may amplify the voices of certain actors or interest groups and mute those of others.”⁷² Professor Walter Berns notes this inherent problem with judicial rule:

Chief among its presumed advantages is that it is governed by lawyers, and lawyers are governed by a “professional ideal of reflective and dispassionate analysis of the problem before [them] and [are] likely to have some experience in putting this ideal into practice.” Not only that, but it is a judge who presides over the process, a judge whose “professional tradition insulates him from narrow political pressures.” Which is to say, the judge, unlike members of Congress, is insulated from the voters and, for that reason, is better able to govern.⁷³

71. Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 185 (1997) (quoting William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda* 102 YALE L. J. 333, 386 (1992)).

72. ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 518 (1985).

73. BERNs, *supra* note 67, at 219 (quoting Abnan Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1307, 1308 (1976)).

The nature of “strategic” litigation, whereby advocates can choose their forum and select certain kinds of plaintiffs, intensifies the problems created by this lack of accountability. Thus, some have publicly called on same-sex couples not to file lawsuits in certain jurisdictions so that victories in more “sympathetic” jurisdictions can be used to leverage their arguments later and get a result that would otherwise be unlikely.⁷⁴

One does not have to accept the charge that judges are becoming “partisans in the culture war” to be concerned about their involvement.⁷⁵ Professor Berns argues that “to allow the judges to ‘create’ constitutional rights means to endow them with the authority to impose their ‘values’ on the country; in practice, of course, what they will impose will be the currently fashionable ‘values.’”⁷⁶ Professor Nagel makes the important point that “good legal thinking can be constitutionally dysfunctional.”⁷⁷ He continues:

If we lawyers insist that our habits and standards should constrain how the Constitution is to be understood, we should face up to how our intellectual norms may be destructive to constitutional values. If the development of pragmatic doctrine helps us lose sight of our Constitution’s basic design—under which the Congress should be held accountable for making the laws and the President for executing them—sophistication will have helped do us in.⁷⁸

C. *Consent of the Governed*

It is the nature of an adversarial legal system that it will produce “winners” and “losers.” The same-sex couple plaintiffs in Massachusetts are the clear winners in the *Goodridge* case. Are there losers? What does the decision mean for them?

The *Goodridge* decision was not oblivious to those who would object to its redefinition of marriage. At the beginning of its opinion, the Massachusetts SJC noted that there were strongly held opinions on both sides of the issue of redefining marriage but claimed that neither was dispositive.⁷⁹ The *Goodridge* court provides interesting characterizations of the opposing viewpoints on this issue. Those who disagree with the court’s decision (the “losers” in *Goodridge*) are characterized as follows: “Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the

74. Bill Myers, . . . *But Lawyers See Slow Going Ahead For Gays in Illinois*, CHI. DAILY L. BULL., Nov. 19, 2003, at 2.

75. See Jeremy Rabkin, *Partisan in the Culture Wars*, 30 MCGEORGE L. REV. 105 (1998).

76. Walter Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 69 (Robert A. Goldwin & William A. Schambra eds., 1985).

77. Nagel, *supra* note 68, at 364.

78. *Id.*

79. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Neither view answers the question before us.”).

union of one man and one woman, and that homosexual conduct is immoral.”⁸⁰ Those who will agree with the court’s decision (the “winners” in *Goodridge*) are described as follows: “Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently from their heterosexual neighbors.”⁸¹ Thus, opponents of redefining marriage are implicitly charged with believing that homosexual persons should *not* be treated the same as heterosexual persons. The disdain this passage seems to show to those who oppose redefining marriage is buttressed in later passages in the opinion where the court states that “[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.”⁸² This, to the court, “suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”⁸³ The concurring opinion of one justice is more forthright:

I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court’s authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, *and to their new status*, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.⁸⁴

While no thoughtful person would argue that decency dictates extending to all persons acceptance, tolerance, and respect, the concurrence seems to go further, making the implicit suggestion that not embracing the redefinition of marriage would violate “simple principles of decency.”⁸⁵

A legal commentator has recently noted, in regard to U.S. Supreme Court decisions that seek to end serious social divisions, that sometimes this self-imposed responsibility “pushes them to adopt tactics that are likely to aggravate the very problem they seek to address. If the nation’s divisions are

80. *Id.*

81. *Id.*

82. *Id.* at 968.

83. *Id.*

84. *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring) (emphasis added).

85. *Id.*

to be healed, the healing will not come about by life-tenured officials issuing indictments that accuse millions of their fellow citizens of animus, prejudice, hostility, or hatred.”⁸⁶ Another has noted: “In the campaigns conducted by litigators (it goes without saying), the opinions of the majority are deprecated and their political efforts are set aside.”⁸⁷

Defenders of controversial decisions might respond that the aim of such decisions is more modest. For instance, a commentator has argued that “*Lawrence* [v. *Texas*, which invalidated a Texas sodomy law] is best interpreted as an opening bid in a conversation between the Court and the American public.”⁸⁸ However, one usually thinks of conversations as being two-sided, so the comparison may not be apt. While courts may refrain from making certain decisions for a time (which approximates listening in the conversation analogy), as long as they adhere to an aggressive approach to judicial review, they will retain the last word. The public’s enthusiasm for a conversation in which one party sets the terms and always reserves the final word is not likely to last forever. What happens if the court opens the conversation and the Nation disagrees? Does the court reverse itself? This does not seem likely. More likely, the court might need to “call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁸⁹ In other words, end the discussion.

Whether the court is scolding citizens for their unenlightened views or engaging them in a conversation or lecture about constitutional values, the result is likely to be alienation of swaths of society (in the case of same-sex marriage, probably a majority) who are the “losers” in litigation over social issues. This is especially true for non-lawyers who have no way of directly participating in the debate. As Professor Robert Nagel notes:

It seems quite possible that in the years ahead the pace of social transformation will only accelerate and that many Americans, caught up in powerful forces beyond their control, will feel increasingly frightened, isolated, and unable to shape their lives. Moreover, lawyers and judges seem likely to continue to play a role in producing this destabilization and alienation. Among other questions, the legal establishment might wonder what people in such a condition will do if their naive faith in legalistic defenses is destroyed.⁹⁰

86. Stephen D. Smith, *Conciliating Hatred*, FIRST THINGS, June-July 2004, at 17, 22.

87. Nagel, *supra* note 71, at 185.

88. Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003).

89. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992).

90. Nagel, *supra* note 71, at 188-89.

As noted above, in responding to criticisms of the judicial nature of the debate over redefining marriage, those who support the change are fond of invoking the principle that only courts can vindicate the rights of unpopular minorities.⁹¹ This is sometimes true, but the history of our legal system does not encourage sanguinity about the ability of the court to always decide rightly on these matters.⁹² The court is more likely to succeed if it sticks closely to actual constitutional provisions and avoids the temptation to insert its policy preferences into the controversy at issue. In addition, a court decision that runs strongly against the trend of popular feeling has to be enforced by some mechanism. In cases where the opposition to the court's policy is particularly strong, that enforcement mechanism may have to be highly compulsory or punitive to have the desired effect. A decision that is clearly rooted in clear constitutional text or the Nation's history and tradition are less likely to engender this kind of opposition. A decision which is meant to vindicate a nebulous and highly controversial value supposedly inherent in a constitution will not command the respect of the citizenry or acquire the legitimacy necessary to be enforced by tradition, custom, and usage rather than through punitive means.

IV. CONCLUSION

It is unlikely that the debate over the redefinition of marriage will end soon. There are still many unanswered questions and unresolved controversies. Will one state have to recognize another state's same-sex marriage? Will the U.S. Supreme Court address the issue? Can constitutions be read to require a redefinition of marriage? How will a redefinition of marriage affect the cultural understanding of the institution?

The matter, though, extends far beyond the questions of marriage and the legal recognition of same-sex unions. This debate also requires us to face questions about the rule of law, the nature of social institutions, and the constitutional status of radical personal autonomy. This paper has attempted to address one of these core questions—the appropriate respective roles of the legislature and the judiciary (and, to some extent, the executive) in social controversies. Along with this central question are corollary matters such as the limits of judicial decision-making authority and the legislature's ability to enforce constitutional guarantees. The answers to these questions will have implications beyond the discrete areas of the definition of marriage and even

91. Kenneth Juan Figueroa, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 409 (2002).

92. See, e.g., *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Korematsu v. United States*, 323 U.S. 214 (1944).

domestic relations. Reaching appropriate, constitutionally sound answers is crucial.

I have suggested that in the litigation to redefine marriage, the balance of power has shifted too far in the direction of judicial supremacy to the point that a legislature (like that of Massachusetts) acts as if it has little or no ability to address a critical substantive issue. Proponents of redefining marriage seem to have little hesitation about seeing the issue removed from the public debate. When other branches intervene, it is often with the implied purpose of securing a court resolution (as in the California and New York litigation over the authority of local mayors to issue marriage licenses to same-sex couples).

If a social issue of such importance is consigned solely to the courtroom, the specter of disenfranchisement will be raised. As capable as lawyers may be, it cannot plausibly be argued that our constitutional order was intended to prevent the political branches from addressing controversial questions when they are raised in the litigation context. Justice Andrew J. Kleinfeld's comment is entirely apposite: "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."⁹³ Recognition of this principle by litigants or judges cannot come too soon.

93. *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld J., dissenting), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

